United States Court of Appeals

for the Second Circuit

RESPONDENT'S BRIEF

76-4260,4282-3

UNITED STATES COURT of APPEALS

FOR THE SECOND CIRCUIT

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, ET. AL.
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

FLATLANDS BAGEL BAKERY, INC., LAURELTON BAGEL BAKERY, GOLDEN BAGEL CORP., NEPTUNE BAGEL BAKERS, INC., AND JOSEPH RUBINSTEIN, MORRIS RUBINSTEIN, AND HERMAN REITER, d/b/a RUBINSTEIN BAGELS,
Respondents.

ON PETITION FOR REVIEW AND CROSS-APPLICATION FOR ENFORCEMENT OF A SUPPLEMENTAL ORDER OF THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

AILEEN A. ARMSTRONG,
ANDREW F. TRANOVICH,

Attorneys,

National Labor Relations Board
Washington, D. C. 20570

JOHN S. IRVING,
General Counsel,
JOHN E. HIGGINS, JR.,
Deputy General Counsel,
CARL L. TAYLOR,
Associate General Counsel,
ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

INDEX

AUTHORITIES CITED

Cases:

I N D E X

Cases--Cont'd: Page

I N D E X

Cases--Cont'd: Page

Statute:

INDEX

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NOS. 76-4260, 4282, 4283

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, BAGEL BOX, INC., BAGEL TOWN, INC., BENSON BAGEL BAKERY, INC., CULVER BAGEL BAKERY, INC., FAR ROCKAWAY BAGEL BAKERY, INC., GOLDEN BAGEL BAKERY, INC., ISLAND PARK NASSAU BAGEL BAKERY, INC., NELSON BAGEL BAKERY, INC., NEPTUNE BRIGHTON BAGELS, INC., RUBINSTEIN BAGELS, INC., RUBINSTEIN BAGELS, INC., TRI-BORO BAGEL CO., INC., D & H BAGEL BAKERY, INC., AND POP'S BAGEL BAKERY, INC.,

Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

FLATLANDS BAGEL BAKERY, INC., LAURELTON BAGEL BAKERY, GOLDEN BAGEL CORP., NEPTUNE BAGEL BAKERS, INC., AND JOSEPH RUBINSTEIN, MORRIS RUBINSTEIN, AND HERMAN REITER, d/b/a RUBINSTEIN BAGELS,

Respondents.

ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF A SUPPLEMENTAL ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

COUNTERSTATEMENT OF THE ISSUE PRESENTED

Whether the Board's backpay awards are reasonable and supported by substantial evidence.

COUNTERSTATEMENT OF THE CASE

This case is before the Court on the petition of Bagel Bakers Council of Greater New York ("Council") and Bagel Box, Inc.; Bagel Town, Inc.; Benson Bagel Bakery, Inc.; Culver Bagel Bakery, Inc.; Far Rockaway Bagel Bakery, Inc.; Golden Bagel Bakery, Inc.; Island Park Nassau Bagel Bakery, Inc.; Nelson Bagel Bakery, Inc.; Neptune Brighton Bagels, Inc.; Rubinstein Bagels, Inc.; Tri-Boro Bagel Co., Inc.; D & H Bagel Bakery, Inc.; and Pop's Bagel Bakery, Inc. pursuant to Section 10(f) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 88 Stat. 395, 29 U.S.C. Sec. 151, et seq.) to review a supplemental decision and order of the National Labor Relations Board issued on October 28, 1976, and reported at 226 NLRB No. 121 (A. 49a-83a)[1/]. The Board has filed a cross-application for enforcement of its order under Section 10(e) of the Act against the Council and those bakeries encompassed by the petition for review, and has filed its own application for enforcement against Flatlands Bagel Bakery, Inc.; Laurelton Bagel Bakery;

1/ "A" and "SA" references are to pages of the printed appendix and supplemental appendix. "GCX," "RX", and "SX" respectively refer to the General Counsel's, the Council's and Stern's (president of Neptune Bagel Bakers, Inc.) exhibits. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "ATT" references are to the Attachments printed at the conclusion of the Board's Brief which contain Appendices to the decision of the Administrative Law Judge inadvertently not included in either the Appendix or Supplemental Appendix.

and Neptune Bagel Bakers, Inc., which participated in the Board's backpay proceedings but may not have been encompassed by the petition for review.[2/] On January 4, 1977, this Court granted the Board's motion to consolidate these cases. This Court has jurisdiction of these proceedings, since the Council and all the bakeries are engaged in business within this judicial circuit.

2/ The Board's application for enforcement was also directed against Golden Bagel Corp. and Joseph Rubinstein, Morris Rubinstein, and Herman Reiter d/b/a Rubinstein Bagels because the designation of these bakeries in the petition for review differed from their designation in the Board's proceedings and order.

I. The Underlying Judicial and Unfair Labor Practice Proceedings

On February 19, 1969, the Board issued its decision and order in Bagel Bakers Council of Greater New York and Its Employer-Members[3/], 174 NLRB 622, in which it found that the Council and its members violated Sections 8(a)(1), (3), and (5) of the Act by engaging in a lockout in violation of Section 8(d) of the Act and in support of bad-faith bargaining, thereby discriminating against their employee-members of the Bagel Bakers Union, Local 338 of the Bakery and Confectionery Workers International Union of America ("Union"). The Board's order required, inter alia, the Council and its members to make whole those employees illegally locked out for any loss of earnings they may have sustained as a result of the unfair labor practices. On February 25, 1971, this Court entered its judgment in N.L.R.B. v. Bagel Bakers Council of Greater New York and its Employer-Members, 434 F.2d 884 (C.A. 2, 1970), cert. denied, 402 U.S. 908 enforcing the Board's order[4/].

3/ Bagel Box, Inc.; Bagel Town, Inc.; Benson Bagel Bakery; Culver Bagel Bakery; Far Rockaway Bagel Bakery, Inc.; Flatlands Bagel Bakery, Inc.; Golden Bagel Corp.; Island Park Nassau Bagel Bakery; Laurelton Bagel Bakery, Nelson Bagel Bakery, Inc.; Neptune Bagel Bakers, Inc.; Rubinstein Bagels, Inc.; Joseph Rubinstein, Morris Rubinstein and Herman Reiter, copartners doing business as Rubinstein Bagels; Tri-Boro Bagel Co., Inc.; Pop's Bagel Bakery, Inc.; and D & H Bagel Bakery.

4/ This Court, in finding that the lockout violated Section 8(a)(3) and (1) of the Act because it was in support of bad faith bargaining, deemed it unnecessary to consider the Board's additional rationale that the lockout was illegal because of the Council's failure to comply with Section 8(d) before engaging in the lockout. N.L.R.B. v. Bagel Bakers Council, supra, 434 F.2d at 888-889, 890, n. 9.

II. The Backpay Proceeding

On June 24, 1976, the Regional Director for the Board's Brooklyn, New York office issued a backpay specification and notice of hearing detailing the amounts of money due each of the 45 named discriminatees (GCX 1(a)).[5/] On September 10, 1976 the Administrative Law Judge issued his decision, finding that 44 named discriminatees were entitled to backpay totaling approximately $161,500, with interest at the rate of six percent per annum. On October 28, 1976, the Board issued its Supplemental Decision and Order adopting, with minor modifications, the Judge's decision and order (A. 78a-83a).

5/ Out of approximately 100 potential claimants, Regional investigation determined that only 45 of the locked out employees were entitled to backpay (SA. 21s). On various dates from July 19 through August 11, 1976, a backpay hearing was held before an Administrative Law Judge in accordance with the Board's Rules and Regulations, 29 C.F.R., Section 102.52-102.59. Counsel for the General Counsel had available for examination all of the discriminatees except those who by agreement were not required to testify (Tr. 2024-2026, 2047-2051). Joseph C. Fleischman and Leon Spanier died prior to the backpay hearing. The claim of Julius Ostrofsky was fully settled at the hearing. Laurelton Bagel Bakery failed to appear at the hearing. Regarding Culver Bagel Bakery, Inc., counsel for the Council stated that that corporation was defunct and expressed willingness to have a judgment rendered against it (SA. 305s).

6/ The Judge's decision was modified to correct his inadvertent failure to credit certain interim earnings against the gross backpay due James Goodrich, and to reflect General Counsel's amendment to the backpay specification concerning the adjusted net backpay due Morris Minton. The Board also ordered that the backpay owed to Markus Weisz should be paid directly to him rather than being placed in escrow, since the Council stipulated that it was not necessary for Weisz to testify provided copies of his income tax returns were produced. Thereafter, copies of the income tax returns were produced and inspected by the Council.

ARGUMENT

THE BOARD'S BACKPAY AWARDS ARE REASONABLE AND SUPPORTED BY SUBSTANTIAL EVIDENCE

A. Introduction

Section 10(c) of the Act authorizes the Board to fashion appropriate affirmative remedial orders to alleviate the effects of unfair labor practices. This section provides that the Board may direct violators "to take such affirmative action, including . . . backpay, as will effectuate the policies of this Act." The broad scope of the Board's authority and discretion to shape the traditional backpay remedy was set forth by the Supreme Court in N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., 396 U.S. 258, 262-263 (1969):

> We start with the broad command of Section 10(c) of the National Labor Relations Act, 29 U.S.C., Section 160(c), that upon finding that an unfair labor practice has been committed the Board shall order the violator "to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies" of the Act. This Court has stated that the remedial power of the Board is "a broad discretionary one, subject to limited judicial review." Fibreboard Corp. v. N.L.R.B., 379 U.S. 203, 216 (1964).
>
> The legitimacy of backpay as a remedy for unlawful discharge or unlawful failure to reinstate is beyond dispute, Mastro Plastics Corp. v. N.L.R.B., 350 U.S. 270, 278 (1956), and the purpose of the remedy is clear. "A backpay order is a reparation order designed to vindicate the public policy of the statute by making the employees whole for losses suffered on account of an unfair labor practice." Nathanson v. N.L.R.B., 344 U.S. 25, 27 (1952).

> As with the Board's other remedies, the power to order backpay "is for the Board to wield, not for the courts." N.L.R.B. v. Seven-Up Bottling Co., 344 U.S. 344 (1953). "When the Board 'in the exercise of its informed discretion,' makes an order of restoration by way of backpay, the order 'should stand unless it can be shown that the order is a patent attempt to achieve ends, other than those which can fairly be said to effectuate the policies of the Act.'" Id., 346-347.

The backpay remedy is designed to restore "the economic status quo that would have obtained but for the . . . wrongful [discharge]." Golden State Bottling Co. v. N.L.R.B., 414 U.S. 168, 188 (1973). The law is clear that the "finding of an unfair labor practice and discriminatory discharge is presumptive proof that some backpay is owed" (N.L.R.B. v. Mastro Plastics Corp., 354 F.2d 170, 178 (C.A. 2, 1965), cert. denied, 384 U.S. 972), and that the General Counsel's burden is limited to showing "what would not have been taken from [the employees] if the Company had not contravened the Act." Virginia Electric & Power Co. v. N.L.R.B., 319 U.S. 533, 544 (1943). As stated in N.L.R.B. v. Brown & Root, Inc., 311 F.2d 447, 454 (C.A. 8, 1963):

> . . . in a backpay proceeding the burden is upon the General Counsel to show the gross amounts of backpay due. When that has been done, however, the burden is upon the employer to establish facts which would negative the existence of liability to a given employee or which would mitigate the liability.

Accord: N.L.R.B. v. Ohio Hoist Manufacturing Co., 496 F.2d 14, 15 (C.A. 6, 1974); Marlene Industries Corporation v. N.L.R.B., 440 F.2d 673, 674 (C.A. 6, 1971) (the employer "had the burden of proof to establish mitigating facts such as amounts earned from alternative employment, or facts which would negative liability, such as a willful failure to accept available employment").

We show below that the basic formula used by the Board for computing gross backpay was proper[7/] and that the Board properly considered and made adjustments for the decline in sales volume experienced by the bakeries during the backpay period. Far from being a "patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act" (N.L.R.B. v. Rutter-Rex Mfg. Co., supra, 396 U.S. at 263), the Board's backpay order is properly designed "to restore the economic status quo that would have obtained but for . . . [the] wrongful discharge[s]." Golden State Bottling Co. v. N.L.R.B., supra, 414 U.S. at 188-189.

7/ No party to this proceeding contests the Board's finding that the backpay period runs from February 1, 1967 to February 1, 1968 (A.56a-58a), except as to Flatlands Bagel Bakery, Inc. and Culver Bagel Bakery, Inc. where backpay liability terminated on June 15, 1967 and June 21, 1967 respectively. See Bagel Bakers Council of Greater New York and Its Employer-Members, supra, 174 NLRB at 622, n. 1; 625, n. 13; and 628.

B. Formula for Computing Gross Backpay

Several courts have recognized that " . . . in many cases it is difficult for the Board to determine precisely the amount of backpay which should be awarded to an employee. In such circumstances the Board may use as close approximations as possible, and may adopt formulas reasonably designed to produce such approximations." N.L.R.B. v. Brown and Root, supra, 311 F.2d at 452. Accord: N.L.R.B. v. Local 138, Inter. Union of Operating Engineers, 380 F.2d 244, 250 (C.A. 2, 1967); Buncher v. N.L.R.B., 405 F.2d 787, 790 (C.A. 3, 1969), cert. denied, 396 U.S. 828; N.L.R.B. v. Rice Lake Creamery Co., 365 F.2d 888, 891 (C.A.D.C., 1966). With respect to the Board's establishing a backpay formula, a reviewing court "may ordinarily go no further than to be satisfied that the method selected cannot be declared arbitrary or unreasonable in the circumstances involved." N.L.R.B. v. Ozark Hardwood Co., 282 F.2d 1, 7 (C.A. 8, 1960); N.L.R.B. v. Brown & Root, Inc., supra, 311 F.2d at 452; N.L.R.B. v. Charley Toppino and Sons, Inc., 358 F.2d 94, 97 (C.A. 5, 1966).

In the instant case, the Board used a modified "projection of average earning formula" on the assumption that but for the unfair labor practices, each claimant would have earned in the bagel industry the same wages and in the same proportions from the various bakeries during the backpay period as he did in calendar year 1966, the calendar year immediately preceding the unfair labor practices (A. 53a)[8/]. This formula, which has received judicial approval[9/], was selected because, as a result of the lockout of all the employee-members of the Union, it was impossible to find precise counterpart employees for the claimants who worked for the Council members during the lockout.

8/ There is no dispute concerning the way in which the claimants were employed. A bakery owner would call the Union and tell the Union's business agent how many boxes of bagels would be required for a particular day. The Union would then send the appropriate number of individuals as determined by the collective bargaining agreement (RX 6, paragraphs Sixth and Eleventh). Although some individuals worked for only one bakery, most of them worked for more than one bakery depending upon the varying requirements of the bakeries for bagels (A. 51a).

9/ See N.L.R.B. v. Charley Toppino and Sons, Inc., supra, 358 F.2d at 97; N.L.R.B. v. Ellis and Watts Products, Inc., 344 F.2d 67, 68 (C.A. 6, 1965).

A modified "projection of average earning formula" had to be used because the "projection of average earning formula" would assume here that a claimant's employment would have continued during the backpay period as it did during calendar year 1966 and that there would have been a continued availability of work in the claimant's former or substantially similar job capacities. The Council, however, established that there was a fundamental change in the bagel industry beginning in 1966 which had a substantial effect on the work available at some of the bakeries in 1967 (A. 59a). Several of the bakeries lost most of their wholesale businesses, and as a result of this loss, most of their sales in 1967 were retail (A. 59a). Since payroll is directly proportional to sales, reduced sales necessarily reduced the amount of work available for the claimants (A. 59a).

To account for this reduction of available work during the backpay period[10/], the Board modified its basic assumption that the claimants would have earned during the backpay period the same amount of money they did in calendar year 1966 by limiting the backpay liability of

10/ The Council offered no evidence of reduced sales of bagels during the backpay period by Bagel Box, Inc., and Nelson Bagel Bakery, Inc.. Flatlands Bagel Bakery, Inc., which was separately represented by its secretary-treasurer, also offered no evidence of reduced bagel sales. Laurelton Bagel Bakery did not appear at the hearing.

each bakery upon the actual bagel sales of that bakery during the backpay period. As the Board properly found (A. 59a):

> the amount of business a given Respondent lost in 1967 is not material. What is material is how much business remained. The issue is how much work would reasonably have been available to the discriminatees but for the Respondents' unfair labor practices. It is the amount of bagel baking business that each Respondent in fact had in 1967 which is critical in determining their limits of liability.

To determine the amount of bagel baking work available during the backpay period required calculating the bagel baking payroll, which in turn was dependent upon how many bagels each bakery produced during the backpay period. The documentary evidence and testimony introduced by the Council established that the bagel baking payroll per box of bagels was $1.00 during the backpay period.[11/] To determine bagel production

11/ This figure was derived from several distinct sources each of which established that the bagel baking payroll was $1.00 per box of bagels. First, Louis Madorsky, an owner of Bagel Town, Inc, testified that in 1966 the basic bagel baking crew consisted of two makers, one baker and one kettleman whose total wages for 100 boxes was approximately $100.00 (A. 60a; SA. 307s -308s). Second, Joseph Rubinstein, an owner of Rubinstein Bagels, Inc., submitted into evidence his production and payroll records for 1966 (A. 59a-60a; RX 50). These records and his testimony show that for the week ending January 14, the bagel baking payroll was $3,505 for 3,510 boxes of bagels produced (a payroll per box ratio of $.99); for the week ending August 12, the bagel baking payroll was $2,101 for 2,058 boxes of bagels produced (a payroll per box ratio of $1.02); and for the week ending December 16, the bagel baking payroll was $1, 358 for 1,407 boxes of bagels produced (a payroll per box ratio of $.96). Third, Manuel Kalkstein, secretary-treasurer of Benson Bagel Bakery, Inc., testified that the labor cost per bagel produced was 1.7 cents. Taking that figure and multiplying it by 56 bagels per box, the bagel baking labor cost per box was approximately $.95 cents (SA. 209s-210s). Fourth, the collective bargaining agreement established one ovenman (baker), two benchmen, and one kettleman as the normal

continued

during the backpay period, total bagel sales must be divided by 56, the number of bagels in a box, and by $.07, the retail cost of each bagel.[12/] Once bagel production during the backpay period is determined by dividing 1967 sales of bagels by the product of $.07 (selling price per bagel) and 56 (the number of bagels per box), the result is the number of boxes of bagels produced. Then the number of boxes of bagels produced during the backpay period is multiplied by $1.00 (the labor cost per box of bagels) to determine the bagel baking labor cost, or the limit of total backpay liability for each bakery.

By using this formula, the Board determined, as closely as possible, the actual payroll cost that would have been sustained by each bakery to produce the number of bagels reflected in the gross sales of bagels for each bakery had not the illegal lockout occurred.[13/] This payroll cost thus served as the limit of each bakery's total backpay liability to all the claimants. See infra., pp. 27-33.

---

11 baking crew and 100 boxes of bagels as the normal day's work (RX 6, paragraph Sixth, Tenth and Eleventh). The agreement also established the minimum daily wage of an ovenman, a benchman and a kettleman as $29.00, $28.00, and approximately $19.00 ($118.00/6 days) respectively (RX 6, paragraphs Ninth and Tenth). Adding the wages of one ovenman, two benchmen, and one kettleman, the baking crew necessary to produce 100 boxes of bagels, the labor cost per 100 boxes of bagels is $104 or $1.04 per box.

12 The Council stipulated that the retail cost of a bagel during the backpay period was seven cents (SA. 297s).

13/ To determine bagel baking payroll during the backpay period, the financial records for the fiscal year occurring during the lockout could not be used, since the owners admittedly baked substantial numbers of bagels during the lockout and thus their compensation would be reflected as officers salaries rather than as wages for production work (A. 60a).

continued

The Council erroneously proposes (Br. 14-17) that since the Council members experienced an average decline in bagel sales of about 60% from 1966 to 1967, the Board's backpay awards should correspondingly be reduced by 60%. As noted supra, however, the Board's formula already reflects the reduced business and consequently the reduced payrolls. In addition, the formula and other factors exclude 56 out of 100 discriminatees from any backpay, and the subtraction of interim earnings from the gross backpay due the remaining 44 discriminatees, reduces the bakeries' liability even further.[14/] Indeed, as noted infra., p. 33, only one employer, D & H Bagel Bakery, would otherwise have had liability as great as that provided by the limiting formula (supra, p. 12). On the other hand, if the Council's proposal were accepted, payroll costs would range from 1.6% to 10.2% of sales (See Table I, infra, p. 14), where the other evidence shows that such costs in fact approximated 25% of sales (1.7 cents in labor cost for a 7 cent bagel see also n. 13).

13/ This would, of course, not accurately reflect the wages necessary to produce the bagels actually sold. To illustrate this point, using Tri-Boro as an example, the bagel baking wage cost percentage to gross sales was 23% for the fiscal year ending January 31, 1967 ($96,370/$415,954); but only 10% for the fiscal year ending January 31, 1968 ($24,931/$228,642) (A. 60a; RX 40, 41).

14/ There is no dispute among the parties regarding the extent of interim earnings nor that the Board deducted all the interim earnings of the claimants prior to determining the net backpay due.

TABLE I

	1967 Sales	Board's Backpay Award Reduced by 60%	Percentage of Payroll Costs to Total Bagel Sales
Bagel Box, Inc.	_____	$ 3,604 x .40= $1,442	____
Bagel Town, Inc.	$98,884 (avg.)	11,621 x .40= 4,648	4.7%
Benson Bagel Bakery, Inc.	67,998	4,351 x .40= 1,740	2.5%
Culver Bagel Bakery, Inc.	147,196	6,944 x .40= 2,778	1.8%
Far Rockaway Bagel Bakery, Inc.	97,395 (avg.)	15,004 x .40= 6,002	6.1%
Flatlands Bagel Bakery, Inc.	_____	2,562 x .40= 1,025	____
Golden Bagel Corp.	98,682	21,241 x .40= 8,496	8.6%
Island Park Nassau Bagel Bakery, Inc.	202,850	17,151 x .40= 6,860	3.4%
Laurelton Bagel Bakery	_____	16,100 x .40= 6,440	____
Nelson Bagel Bakery, Inc.	_____	52 x .40= 21	____
Neptune-Brighton Bagels, Inc.	49,953	6,068 x .40= 2,427	4.8%
Rubinstein Bagels, Inc.	181,401	7,082 x .40= 2,833	1.6%
Tri-Boro Bagel Co, Inc.	288,642	18,482 x .40= 7,393	2.6%
D & H Bagel Bakery, Inc.	37,561	9,595 x .40= 3,838	10.2%
Pop's Bagel Bakery, Inc.	104,537	14,546 x .40= 5,818	5.6%

C. Contractual Reduction in Piece Rate

Nor is there any merit to the Council's argument (Br. 15) that since the non-Council bakeries negotiated a reduction in the bagel baker's daily wage from $28.00 to $26.00 per 100 boxes of bagels, its backpay liability should be reduced correspondingly (A. 65a, Cf. 1966 contract (RX 6), paragraphs Sixth and Ninth with 1967 contract (RX 61 - rejected, paragraph 2). In the first place, the Council seeks to benefit from the good faith bargaining of the non-Council members in reducing the contractual piece rate when, as this Court has found, the Council not only refused to bargain in good faith, but also refused to produce records that would justify the Council's request for reduced wages. N.L.R.B. v. Bagel Bakers Council of Greater New York and its Employer-Members, supra, 434 F.2d at 887-888.[15] As this Court has held, even after expiration of a collective bargaining agreement, an employer cannot unilaterally change the contractual terms and conditions of employment absent good faith bargaining to impasse with the union. New York Printing Pressmen and Offset Workers Union No. 51 v. N.L.R.B., 538 F.2d 496, 501 (C.A. 2, 1976). Accord: Hinson v. N.L.R.B., 428 F.2d 133, 137-138 (C.A. 8, 1970); Industrial Union of Marine & Shipbuilding Workers of America, AFL-CIO v. N.L.R.B., 320 F.2d 615, 619-620 (C.A. 3, 1963), cert. denied sub nom., Bethlehem Steel Co. v. N.L.R.B., 375 U.S. 984. Moreover, there can be no genuine impasse if the employer fails to bargain in good faith. New York Printing Pressmen and Offset Workers Union No. 51 v. N.L.R.B.,

15/ In fact, as this Court noted, the Board found that ". . . Council President Glass met privately with three Local 338 negotiators, and admitted that not all of the employers were losing money, 'but certain of my members want to take advantage of this situation . . . they want this 40 percent reduction'." Id., p. 887.

supra, 538 F.2d at 501. Secondly, the Council failed to have admitted into evidence an authenticated copy of the new contract. When the Council offered the contract into evidence, the exhibit was rejected for lack of proper authentication (Tr. 2005-2007). Later, when Harriet Lewis testified that Flatlands signed the new contract in June 1967, the Council failed to have her authenticate it (Tr. 2028-2036). Nor does the contract itself, if considered, advance the Council's case. The contract provides for a reduction in wages only " . . . so long as the Employer operates and maintains in effect a full time wholesale truck route and actively engages in the sale and distribution of bagels wholesale." Otherwise, there is a reduction only in the daily wage of the baker of 1 cent per box of bagels, effective May 1967, (RX 61, paragraph 2 (rejected)). The Council members, however, testified that they lost almost all of their wholesale trade shortly before the backpay period, and that no bakery was engaged in a "full time wholesale truck route" during the backpay period (A. 59a).[16/]

16/ The contract defines a "full time wholesale truck route" as a "route which operates a minimum of six (6) full days in each week." (footnote to paragraph Second, RX 61 (rejected).

D. Awarding Holiday and Vacation Pay

1. The backpay specification was properly amended

The backpay specification, as originally issued, did not allege that the claimants were entitled to reimbursement of the holiday and vacation pay that would have been paid to them during the backpay period absent the illegal lockout. On August 5, 1976, after there had been more than two weeks of testimony on this issue, the Administative Law Judge granted the motion of counsel for the General Counsel to amend the backpay speification to include the holiday and vacation pay as items properly recoverable from the Council members in the backpay proceedings (A. 66a)[17/]. The Council contends (Br. 12-13) that the Administrative Law Judge erred in granting the amendment because of the Board's delay in alleging this item of loss and the Judge's failure to grant the Council an adjournment of the hearing after allowing the amendment to the backpay specification. Neither contention, however, has any merit.

17/ The Council does not dispute the fact that holiday and vacation pay are items properly recoverable in a backpay proceeding. See Interboro Contractors, Inc., 175 NLRB 727, 728 (1969), enf'd, 432 F.2d 854 (C.A. 2, 1970), cert. denied, 402 U.S. 915; Hickman Garment Co., 206 NLRB 25, 26 (1973), enf'd summarily, 497 F.2d 1339 (C.A. 6, 1974); Heinrich Motors, Inc., 166 NLRB 783, 786 (1967), enf'd, 403 F.2d 145 (C.A. 2, 1968).

To prevail on either contention, the Council must show an abuse of discretion by the Administrative Law Judge in granting the amendment or in denying the continuance. See N.L.R.B. v. Interboro Contractors, Inc., supra, 432 F.2d at 860; Kellwood Company, Ottenheimer Division v. N.L.R.B., 411 F.2d 493, 500 (C.A. 8, 1969). Accord: Frito Co. v. N.L.R.B., 330 F.2d 458, 465 (C.A. 9, 1964); N.L.R.B. v. Guernsey-Muskingum Electric Co-op, Inc., 285 F.2d 8, 11 (C.A. 6, 1960). Furthermore, ". . . something more than error is necessary to spell out arbitrary or capricious action." N.L.R.B. v. J.W. Rex Co., 243 F.2d 356, 358 (C.A. 3, 1957). While the Council members were not notified in the original backpay specification that the claimants were entitled to holiday and vacation pay, the record indicates that at the start of the hearing, the claimants uniformly testified that but for the illegal lockout, they would have received these payments (SA. 104s, 119s-120s, 127s-128s, 143s-146s, 152s-154s, 161s-162s, 168s-170s, 176s-177s, 192s-194s, 198s-199s, 225s-227s, 244s-246s, 252s, 255s-258s). The Council members and all parties participating at the hearing examined the documentary evidence and cross-examined the claimants regarding the legitimacy of these claims. Since the collective bargaining agreement explained how these payments would be made by the Council members[18/], and since all parties explored the legitimacy of these claims

18/ See RX 6, paragraphs Thirteenth, Fourteenth, and Seventeenth.

at the hearing, the Council cannot claim surprise as the result of the introduction of unforeseen evidence to which the Council could not respond. Indeed, the Council cannot show any prejudice whatsoever resulting from either the Judge's granting of the amendment or in denying the motion for a continuance. Moreover, as the Judge fully explained at the hearing, he could not grant the Council's request for a continuance of the hearing because of the writ of mandamus issued by this Court requiring the Board to "determine claimants' backpay awards within 60 days from the date of this opinion." Silverman v. N.L.R.B., 543 F.2d 428, 430 (C.A. 2, 1976). (A. 337a-339a). Consequently, the Council has failed to show an abuse of discretion by the Judge in either granting the amendment or in denying the continuance. See N.L.R.B. v. Roure Dupont Mfg. Co., 199 F.2d 631, 633 (C.A. 2, 1952); N.L.R.B. v. Dinion Coil Co., 201 F.2d 484, 491 (C.A. 2, 1952); N.L.R.B. v. Schoellkopf Products, Inc., 410 F.d 82, 88 (CA. 5, 1969); N.L.R.B. v. Preisner Scientific, Inc., 387 F.2d 143, 144 (C.A. 4, 1967).

2. The method of computing holiday and vacation pay

Although the formula for computing holiday and vacation payments changed during the backpay period as a result of collective bargaining between the non-Council bakeries and the Union,[19] the Board, consistent with its position in computing gross backpay, supra, p. 15, determined the holiday and vacation pay due the claimants based upon the collective bargaining agreement between the Council members and the Union existing immediately prior to the illegal lockout. That agreement states that each Council member ". . . agrees, for each box of bagels produced, to pay weekly to the Vacation and Holiday Fund the sum of eight and one-half cents ($00.085)" (RX 6, paragraph Seventeenth). As a result of those contributions, the parties stipulated that each baker received $1,240 from the fund in calendar year 1966 (A. 71a; See also GCX 6, 7, 8, 10, 12, 17). In calendar year 1967, each baker received $224 from the fund (A. 71a; GCX 7, 9, 11, 18).[20]

19/ The new agreement provided that effective May 1967, the non-Council bakeries would no longer be required to contribute to the Union's Vacation and Holiday Fund, but instead would pay $3.50 and $2.50 per day to those bakers and helpers respectively who would work for them (RX 61 - rejected, paragraph 4).

20/ The kettlemen received $590 from the fund in calendar year 1966 and $89 in 1967 (A. 71a; GCX 14, 15).

Computing the holiday and vacation pay due the claimants during the backpay period presents a problem in allocation, since the amounts received by the claimants in 1966 and 1967 resulted from contributions made to the fund by both Council and non-Council bakeries. Since the holiday and vacation contributions of all the bakeries were based upon production as were the earnings of the claimants, the Board charged the Council members for only the loss proportionate to each claimant's earnings from Council members (A. 71a). Thus, if a claimant received $10,000 in total earnings in 1966 only $5,000 of which was derived from Council bakeries, one-half (5,000/10,000) of the $1,240 he received for holiday and vacation pay in 1966 would be attributable to Council members.

To compute the liability of the Council members for holiday and backpay during the eleven months of the backpay period occurring in 1967 (February 1 - December 31), the Board multiplied the ratio of the claimant's 1966 Council earnings to his 1966 total earnings by $1240 (the actual holiday and vacation pay received in 1966 which was projected as the amount that would have been received in 1967 but for the unfair labor practices) and subtracted from that amount $244, the holiday and vacation pay actually received by the claimants in 1967. Thus, in the example given, the result would be $5,000/$10,000= 1/2 x 1240=620-224=$396 (holiday and vacation pay due for 1967). The January 1968 holiday and vacation pay due the claimants

would be 1/12 of the 1966 holiday and vacation pay after the contribution of the Council members was again allocated (A. 72a). Thus, in the example given, the result would be 1/12 x 1240=103 (to determine the average monthly contribution of both Council and non-Council members to the fund on behalf of each claimant) x 1/2 (5,000/10,000)=$51.50 (to determine the amount the Council members contributed to the average monthly contribution).[21/]

E. Overtime Restriction

The Council erroneously contends (Br. 16-17) that the Board failed to consider the overtime restrictions in the collective bargaining agreement insofar as the backpay award included compensation for overtime. As the Board properly noted in awarding backpay in this case, "[t]he test in determining the amount of backpay owing is how much the discriminatee might reasonably have expected to earn but for the employer's unfair labor practices" (A. 61a).[22/] Although the contract prohibits employees from working overtime, this restriction

21/ If, however, the claimant were a kettleman, the 1966 holiday and vacation pay figure used in the computation would be $590, and the 1967 holiday and vacation pay figure would be $89.

22/ As the Supreme Court noted in Golden State Bottling Co. v. N.L.R.B., supra 414 U.S. at 188 (1973) ". . . an order requiring reinstatement and backpay is aimed at 'restoring the economic status quo that would have obtained but for the Company's wrongful refusal to reinstate . . .," citing N.L.R.B. v. J.H. Rutter-Rex Mfg. Co., Inc., 396 U.S. 258, 263 (1969).

relates to the further contractual restriction prohibiting employees from working more than six days per week (RX 6, paragraphs Third and Fourth)[23]. In this sense, if overtime is taken to mean working more than six days a week, the backpay award does not include overtime since none of the claimants worked more than six days a week prior to the lockout. If, however, overtime is taken to mean producing more than 100 boxes of bagels per day[24], the claimants and the bakery owners testified uniformly that the bakers routinely produced more than 100 boxes of bagels each day, and that no one considered this to be a violation of the contract (A. 61a; SA. 27s-28s, 35s-37s, 63s-64s, 72s, 75s, 83s, 86s, 91s, 93s, 99s, 101s-1-101s-2 , 134s-135s, 141s-142s, 159s-160s, 195s). In fact, the Morris Skolnick, the former president of the Union upon whose testimony the Council bases its argument (See Br. 16-17), supported the Board's finding that the overtime restriction was not meant to limit the payroll of each bakery, but rather was a device to spread work during slack periods (A. 61a). Skolnick testified that prior to the lockout, the average baker produced approximately 1000 boxes of bagels per week. Since the normal work week was six days, and if 100 boxes of bagels were the normal daily production, each baker was making 400 boxes each

---

23/ See also RX 6, paragraph Ninth where the weekly minimum wage is based upon a six-day work week.

24/ Although RX 6 paragraph Sixth provides that 100 boxes of bagels shall be a day's work for three men (one ovenman and two benchmen), the contract does not prohibit the making of more than 100 boxes but simply gives the Union the right to require the employment of a fourth man called a "jobber".

week in excess of the overtime restriction. Obviously, the parties did not regard the overtime restriction as limiting a set of bagel bakers (i.e., one ovenman and two benchmen) to making only 100 boxes per day, and the Board properly disregarded the overtime restriction in awarding backpay (A. 61a).

F. Computing backpay on an annual rather than quarterly basis

Except in unusual cases, the Board computes backpay on a quarterly basis pursuant to its decision in F.W. Woolworth Co., 90 NLRB 289 (1950), which method was approved by the Supreme Court in N.L.R.B. v. Seven-Up Bottling Co. of Miami, 344 U.S. 344, 347-348 (1953).[25] The Council argues (Br. 21) that since the Board did not compute backpay here on a quarterly basis, the Board's backpay award cannot be enforced. There is no merit to the Council's argument for

25/ As this Court noted in Lodges 743 and 1746, International Assn. of Machinists and Aerospace Workers, AFL-CIO v. United Aircraft Corp., 534 F.2d 422, 447 (C.A. 2, 1975), cert. denied, 45 USLW 3250 (October 4, 1976), the Board adopted the quarterly method for computing backpay chiefly to cure the conflict with the Board's reinstatement remedy that occurred whenever a wrongfully discharged employee later obtained a higher-paying position with a new employer. The employee was faced with a choice of either waiving his right to reinstatement, thereby terminating the period for running of backpay, or retaining the right to reinstatement while seeing his backpay award steadily diminish.

several reasons. Since the Council did not file exceptions with the Board to the decision of the Administrative Law Judge to compute backpay on a yearly basis, the Council is precluded under Section 10(e) of the Act from seeking review of this decision before this Court. See N.L.R.B. v. Local 3, International Brotherhood of Electrical Workers, 362 F.2d 232, 234-235 (C.A. 2, 1966); N.L.R.B. v. Park Edge Sheridan Meats, Inc., 323 F.2d 956, 959 (C.A. 2, 1963); N.L.R.B. v. Enterprise Association etc., 285 F.2d 642, 646-647 (C.A. 2, 1960).[26/] In any event, this Court in Lodges 743 and 1746, International Assn. of Machinists and Aerospace Workers, AFL-CIO v. United Aircaft Corp., supra, 534 F.2d at 446 stated, citing N.L.R.B. v. Seven-Up Bottling Co. of Miami, supra, that:

> [t]he Board's remedial rules are themselves not explicitly embodied in a statute; they are the product of the discretion that is vested in the Board to devise remedies to effectuate the policies of the Act. As such, they are subject to modification in order to conform to the circumstances of particular cases.

26/ In fact, the Council in its exceptions stated that "Counsel for Respondents respectfully requests the National Labor Relations Board to adopt those findings and recommendations of the Judge which Counsel for respondents takes no exceptions, as these findings and recommendations are supported by the preponderance of the credible evidence adduced at the hearing" (A. 85a, 91a).

In this case, the Board calculated " . . . the backpay on yearly rather than quarterly periods because of the particular nature of this industry, namely that employees moved from one employer to another, not all of the employees in the industry were involved in the unfair labor practice and the industry is somewhat seasonal. Thus, to use all four quarters as the base year . . . appropriately reflects seasonal adjustments" (A. 54a). Accordingly, the Board had a rational basis for modifying its usual practice and did not abuse its discretion in computing the backpay due the claimants on a yearly rather than a quarterly basis.

G. Method of computing net backpay due the claimants

As stated previously, supra, p. 9, the Board assumed that but for the unfair labor practices, each claimant would have earned in the bagel industry wages in the same proportions from the various bakeries during the backpay period as he did in 1966. Each claimant's loss of wages for 1967 would then be his lost earnings from Council members (i.e. total gross wages for February through December 1966 less wages derived during that period from non-Council bakeries), less any amount actually received from Council members in 1967 (i.e., wages from Council members received in January 1967, the month before the lockout). (A. 69a-70a).[27/] Moreover, since the amount of backpay due a claimant would be the specific obligation of only those Council members for which he worked in 1966, an allocation of the backpay liability of all Council members had to be made to determine the potential liability of each Council member to each claimant (A. 69a).

27/ Of course, Flatlands and Culver ended their lockout in June 1967, and the Board adjusted their liability accordingly.

As a result of these propositions, the Board determined the 1967 gross backpay liability of all the Council members to each claimant by subtracting from his 1966 gross earnings from Council members, his 1967 gross earnings from Council members. Thus, if a claimant worked equally for Council and non-Council bakeries in 1966 and had gross earnings in 1966 of $12,000, the gross backpay liability of all Council members to that claimant would be $12,000 - $1,000 (earnings during January 1966, assuming, of course, wages of $1,000 per month)=$11,000/2=$5,500 (amount derived from Council members). Any interim earnings from Council members during January 1967 would be subtracted from $5,500 to receive gross backpay liability of all Council members to a particular claimant for February 1, 1967 to December 31, 1967.

From the 1967 gross backpay liability, the 1967 interim earnings received by a claimant had to be subtracted. However, since most of the claimants normally had earnings from both Council and non-Council bakeries, only those interim earnings were subtracted as exceeded the amount of earnings received from non-Council members in 1966 (A. 70a). The prior example shows why this is necessary. To derive the amount a claimant received from Council members in 1967, i.e., $5,500 in the example, it was necessary to subtract all earnings from non-Council bakeries in 1966. Since gross earnings for 1966 in the example was $11,000 (after January 1966 earnings were subtracted) and the claimant worked equally for Council and non-Council members, $5,500 had to be

subtracted from $11,000 to determine that $5,500 was received from Council members in 1966. Since static earnings are assumed, only those interim earnings from non-Council sources exceeding $5,500 in 1967 must be subtracted from $5,500, the gross amount of wages that would have been received from Council sources absent the unfair labor practices. To subtract any 1967 wages from non-Council sources amounting to less than $5,500 would result in a double compensating for earnings received from non-Council sources. In short, since 1966 non-Council earnings are excluded in calculating the gross backpay d a claimant from the Council members, such earnings should not be considered in calculating interim earnings (A. 70a).

The 1968 gross backpay of each claimant is limited to the month of January. The Board assumed that each claimant would have earned in January 1968 from Council members what he actually earned from them in January 1967. Of course, interim earnings for January 1968 would be those non-Council earnings in excess of normal (i.e., those actually earned in January 1967) (A. 70a).

By combining these propositions, the Board concluded that the net backpay due each claimant for the backpay period from all Council members equalled each claimant's 1966 earnings from Council members after the interim earnings of the claimant from February 1, 1967 to

February 1, 1968 were subtracted (A. 71a)[28/]. To this amount was added the holiday and vacation pay due (supra, pp. 21-23). After adding these two figures, the resulting sum had to be allocated among the Council members only in proportion to that claimant's earnings derived from that bakery in 1966. Thus, if the total backpay liability of all Council members to a claimant was $1,000 (net earnings during backpay period + holiday and vacation pay), and that claimant derived 10% of his 1966 Council earnings from Bakery A, this bakery's backpay liability would be $100.

However, as explained in detail earlier (supra, pp. 10-12), the Board, because of evidence of reduced bagel sales during the backpay period, used a modified "projection of average earnings formula" as a means of limiting the backpay liability of each bakery based upon actual 1967 bagel sales. As shown on Table II infra, pp. 31-32, the limited backpay liability of each bakery was greater than its backpay liability without regard to the limit of all the employers except D & H Bakery (ATT. 2):

28/ Although January 1967 Council earnings are subtracted from 1966 Council earnings to arrive at gross backpay due each claimant from February 1 to December 31, 1967 (supra, p. 27), this amount must be added to determine gross backpay due each claimant for January 1968 (A. 71a). Thus, as the Board properly concluded, to determine gross backpay liability due each claimant for the entire backpay period, ". . . the January 1967 Council earnings can be ignored (to subtract it and then to add it gives a zero sum)." (A. 71a).

TABLE II

Limit to Backpay Liability of Each Respondent [29/] 1967
Sales X $1/$.07 X 56 = Bagel payroll = Limit of Liability

	1967 Sales	Limit of Backpay Liability	Owed
Bagel Box, Inc.	———	———	$ 3,604
Bagel Town, Inc.	$ 98,884 (avg.)	$22,225	11,621
Benson Bagel Bakery, Inc.	67,998 (RX 34, 63)	17,346	4,351
Culver Bagel Bakery, Inc.	147,196	37,550	6,944
Far Rockaway Bagel Bakery, Inc.	97,395 (avg.)	24,846	15,004
Flatlands Bagel Bakery, Inc.	———	———	3,041
Golden Bagel Corp.	98,682 (RX 53)	25,174	21,241
Island Park Nassau Bagel Bakery, Inc.	202,850 (RX 21)	51,747	17,143

29/ Bagel Box, Inc. Laurelton Bagel Bakery, and Nelson Bagel Bakery, Inc. did not introduce any evidence regarding bagel sales during the backpay period.

Since the fiscal years of Bagel Town, Inc. (July 1 - June 30) and Far Rockaway Bagel Bakery, Inc. (April 1 - March 31) did not closely correspond to the backpay period, the Board averaged their bagel sales during the closest two fiscal years to the backpay period to approximate their bagel sales during the backpay period. For Bagel Town, the computation is as follows: bagel sales of $110,691 for fiscal year of July 1, 1966 to June 30, 1971 (RX 18) and $87,076 for fiscal year of July 1, 1967 to June 30, 1968 (RX 19). Thus $110,691 + $87,076/2 = $98,884, average bagel sales during backpay period. For Far Rockaway Bagel Bakery, the computation is as follows:

(continued)

Limit to Backpay Liability of Each Respondent 1967
Sales X $1/$.07 X 56 = Bagel payroll = Limit of Liability

	1967 Sales	Limit of Backpay Liability	Owed
Laurelton Bagel Bakery	_____	_____	16,092
Nelson Bagel Bakery, Inc.	_____	_____	52
Neptune-Brighton Bagels, Inc.	49,953 (RX 55)	12,743	6,068
Rubinstein Bagels, Inc.	181,401 (RX 60)	46,276	7,082
Tri-Boro Bagel Co., Inc.	288,642 (RX 41)	73,633	18,454
D & H Bagel Bakery, Inc.	37,561 (RX 37)	9,595	17,135
Pop's Bagel Bakery, Inc.	104,537 (RX 54)	26,668	13,318

29/ sales of $143,094 for fiscal year of April 1, 1966 to March 31, 1967 (RX 23) and $51,695 for fiscal year of April 1, 1967 to March 31, 1968 (RX 24). Thus, $143,094 + $51,695/2 = $97, 395, average bagel sales during backpay period.

Since the limit of backpay liability of D & H Bagel Bakery, Inc. ($9,595) is less than the total backpay owed ($17,135), this bakery's backpay liability was reduced to $9,595 and the backpay due each claimant was reduced by 56% (i.e. $9,595/$17,135 = 56%). See ATT. 3.

H. Awarding interest on the backpay due the claimants

Although the Council tacitly admits that the Board can award interest on the backpay owed to claimants in a backpay proceeding,[30] the Council argues (Br. 17-18) that no interest should be awarded here because of the Board's delay in issuing the backpay specification. A similar contention, however, was rejected in N.L.R.B. v. Rutter-Rex Mfg. Co., supra, 396 U.S. at 264-265 where the Supreme Court held that:

> [a]ssuming without deciding that the delay in issuing the specification did violate the Board's duty of prompt action under the Administrative Procedure Act, it does not follow that enforcement of the full-back-pay remedy was an abuse of the Board's discretion. Wronged employees are at least as much injured by the Board's delay in collecting their backpay as is the wrongdoing employer . . . . This Court has held before that the Board is not required to place the consequences of its own delay, even if inordinate, upon wronged employees to the benefit of wrongdoing employers. N.L.R.B. v. Electric Cleaner Co., 315 U.S. 685, 698 (1942); N.L.R.B. v. Katz, 369 U.S. 736, 748, n. 16 (1962).

30/ See N.L.R.B. v. Local 138, International Union of Operating Engineers, AFL-CIO, 380 F.2d 244, 254 (C.A. 2, 1967); Reserve Supply Corp. v. N.L.R.B., 317 F.2d 785, 789 (C.A. 2, 1963).

Here, as the Supreme Court pointed out in in N.L.R.B. v. Rutter-Rex Mfg. Co., supra, 396 U.S. at 266, the Council or any affected bagel bakery owner could have compelled earlier Board action by bringing suit under the Administrative Procedure Act to "compel agency action unlawfully withheld or unreasonably delayed." See 5 U.S.C. §706(1). Since the Council did not seek earlier relief under the Administrative Procedure Act, this Court should not shift the cost of delay from the wrongdoing employers to the claimants, the victims of the unfair labor practices.

I. Neptune-Brighton Bagels, Inc. is a successor employer responsible for remedying the unfair labor practices of Neptune Bagel Bakers, Inc.

The Council finally contends (Br. 18-20) that Neptune-Brighton Bagels, Inc. should not be held responsible for remedying the unfair labor practices of Neptune Bagel Bakers, Inc.[31] because it was denied due process by not being formally notified of the Board's proceedings against the Council prior to the backpay hearing and because it was not a successor employer responsible for remedying unfair labor practices. Neither contention, as we show below, has any merit.

31/ The Administrative Law Judge rejected Neptune's defense that it should be absolved of backpay liability because it is a defunct corporation (A. 68a). Since Neptune failed to file exceptions to this finding, the Board is entitled to summary enforcement of that part of its order directed against Neptune. In any event, the Supreme Court in Golden State Bottling Co. v. N.L.R.B. 414 U.S. 168, 186-187 (1973) held that ". . . it must be obvious that it cannot be in the public interest to permit the violator of the Act to shed all responsibility for remedying his own unfair labor practices by simply disposing of the business." In accordance with this decision, the Board properly held Neptune and Neptune-Brighton jointly and severally liable for the backpay award.

1. Neptune-Brighton was accorded due process

In discussing what due process requires before a successor employer can be held responsible for remedying the unfair labor practices of its predecessor, the Supreme Court in Golden State Bottling Co. v. N.L.R.B., supra, 414 U.S. at 180 stated:

> There will be no adjudication of liability against a bona fide successor 'without affording [it] a full opportunity at a hearing, after adequate notice, to present evidence on the question of whether it is a successor which is responsible for remedying a predecessor's unfair labor practices. The successor [will] also be entitled, of course, to be heard against the enforcement of any order issued against it'.

Obviously, Neptune-Brighton was not denied due process here where it was a party, after proper notice, to the backpay proceeding, afforded full opportunity, with the assistance of counsel, to contest the issue of its successorship and its knowledge of the pendency of the unfair labor practice litigation at the time of the purchase, and also made a party to the instant enforcement proceedings.

2. Neptune-Brighton was a successor employer responsible for remedying unfair labor practices

In Golden State Bottling Co. v. N.L.R.B., supra, the Supreme Courts approved of Board orders requiring a successor employer to reinstate with backpay employees unlawfully discharged by the predecessor employer where the successor company acquired the predecessor with notice of the unfair labor practices and continued the business without substantial interruption or change in operations and employee or supervisory personnel. In explaining its decision, the Supreme Court in Golden State (id. p. 171, n. 2) quoted with approval from Perma Vinyl Corp. 164 NLRB 968, 969 (1967), enf'd sub nom., United States Pipe & Foundry Co. v. N.L.R.B., 398 F.2d 544 (C.A. 5, 1968) where the Board held:

> To further the public interest involved in effectuating the policies of the Act and achieve the 'objectives of national labor policy, reflected in established principles of federal law,' we are persuaded that one who acquires and operates a business of an employer found guilty of unfair labor practices in basically unchanged form under circumstances which charge him with notice of unfair labor practice charges against his predecessor should be held responsible for remedying his predecessor's unlawful conduct.

Although the Supreme Court has noted that there is not a simple checklist to determine successorship for all purposes,[32] the Supreme Court also noted in Golden State that successorship with the inherent obligation to remedy unfair labor practices requires a finding of a "substantial continuity of identity in the business enterprise." Id., p. 182, 184. A "substantial continuity of identity in the business enterprise" occurs when the successor employer acquires the substantial assets of its predecessor and continues without substantial interruption or change, the business operations of the predecessor Id., p. 182-183 and n. 5.

32/ See Howard Johnson Co., Inc. v. Hotel Employees, 417 U.S. 249, 262-263, n. 8 (1974) where the Supreme Court stated that "[t]here is, and can be, no single definition of 'successor' which is applicable in every legal context. A new employer in other words, may be a successor for some purposes and not for others."

Applying both the due process and successorship tests here, it is clear that Neptune-Brighton is a successor employer who purchased the business with knowledge of the unfair labor practices alleged against the Council by the Union. Donald Chakofsky, the principal owner of Neptune-Brighton, was an employee of Neptune and a member of the Union at the time of the lockout (A. 68a; SA. 273s, 275s). When Neptune ceased doing business about the time of the lockout, Chakofsky bought the entire business of Neptune, i.e., "the bagel bakery . . ., the good will thereof, together with the fixtures, machinery, baking utensils, chattels, one truck and the lease and security thereunder covering the store and bakeshop. . . ." (A. 67a; SX 1). Since the sale, Chakofsky has continued to operate the bagel bakery with the same equipment and in the same building.[33/] Shortly after the sale, Chakofsky joined the Council and indeed joined the Council lockout of the employee-members of the Union (A. 68a; 286s-288s). In joining the Council and allying itself with the Council's labor policies, it is clear that Neptune-Brighton would have secured its employee complement from referrals by the Union as had Neptune.

33/ After the sale, Chakofsky did purchase new benches for making bagels, since the old ones had worn-out (SA. 271s).

The Council does not dispute these facts but argues that there was a lapse in time from when Neptune ceased and Neptune-Brighton began operations and that Chakofsky did not know of the lockout. Time lapse between the predecessor and alleged successor, although a factor to be considered, does not break the continuity of the employing enterprise and preclude a finding of successorship. See N.L.R.B. v. Band-Age, Inc., 534 F.2d 1, 5 (C.A. 1, 1976), cert. denied, 45 USLW 3330 (No. 76-275, Nov. 1, 1976) (4 weeks hiatus); N.L.R.B. v. Daneker Clock Company, Inc., 516 F.2d 315, 316 (C.A. 4, 1975) (8 month hiatus); N.L.R.B. v. Polytech,Inc., 469 F.2d 1226, 1230 (C.A. 8, 1972) (4 week hiatus); C.G. Conn, Ltd., 197 NLRB 442, 447 (1972), enf'd 474 F.2d 1344 (C.A. 5, 1972) (4 1/2 month hiatus)[34/]. While Chakofsky testified that he did not know of the lockout, he readily

34/ While the Board has sometimes relied upon a substantial hiatus between the termination of the predecessor's operations and the commencement of the new employer's operations in finding a lack of successorship, it has done so only where the hiatus in operations is one of many factors pointing to such a substantial transformation in the nature of the predecessor's operations that no continuity in the employing enterprise could be found. N.L.R.B. v. Band-Age, Inc., supra, 534 F.2d at 5. See, e.g., Georgetown Stainless Mfg. Corp., 198 NLRB 234, 236-238 (1972) (three-week hiatus considered together with new employer's buying from predecessor's creditors, operating the equipment bought in a significantly different manner, and changing product from expensive to cheap sinks); Gladding Corporation, 192 NLRB 200, 201 (1971) (two-month hiatus considered together with

(continued)

admitted that he knew of the labor dispute between the Council and the Union. Moreover, even absent this admission, his membership in the Union at the time of the lockout supports the Board's finding that he was aware of the lockout when he purchased Neptune.[35/]

34/ predecessor going bankrupt, new employer making substantial changes in production processes "from the very beginning of operations," and new employer being part of a multi-plant, integrated enterprise); Radiant Fashions, Inc., 202 NLRB 938, 940-941 (1973) (two and a half month hiatus considered along with fact that when predecessor terminated operations at single plant, no reopening of that plant was contemplated because new employer was not yet in existence, that predecessor continued operations at other plants, and that new employer altered methods of production, type of market supplied and kinds of products produced).

35/ Flatlands Bagel Bakery, which was separately represented at the hearing by its secretary-treasurer Harriet Lewis, filed exceptions to two findings of the Administrative Law Judge. One of her exceptions regarding the net backpay due claimant Morris Minton was granted by the Board (A. 79a, n. 2; See Tr. 2027). Her second exception alleged that claimants William Breier, Murray Fertel, Joseph Fleischman and Leon Lifshutz should not be awarded backpay since "they did not appear nor did they testify" and that Flatlands' backpay period should be limited to a "four month loss." Fertel and Lifshutz did appear and testify at the hearing (Tr. 321-330; 452-473). Fleischman ($26.00 in backpay owed by Flatlands) died prior to the hearing, although all of his wage data was produced by the Board at the hearing (Tr. 2025-2026, 2050). William Brier ($246.00 in backpay owed by Flatlands) was excused from appearing by all parties at the backpay hearing (Tr. 2024, 2047-2048). Flatlands backpay period, as stated previously, supra, p. 7, n. 7, extends from February 1, 1967 to June 15, 1967, slightly over four months. Since Flatlands has not filed an answer nor taken any action regarding the Board's enforcement application and since the Board adopted all of the material exceptions filed by Flatlands, the Board is entitled to summary enforcement of its order directed against Flatlands.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for review should be denied and a judgment should be entered enforcing the Board's order in full.

AILEEN A. ARMSTRONG,
ANDREW F. TRANOVICH,

Attorneys,

National Labor Relations Board.
Washington, D.C. 20570

JOHN S. IRVING,
General Counsel,

JOHN E. HIGGINS, JR.,
Deputy General Counsel,

CARL L. TAYLOR,
Associate General Counsel,

ELLIOTT MOORE,
Deputy Associate General Counsel,

National Labor Relations Board.

February 1977

ATTACHMENT 1

JD-597-76

Appendix 46

1967 Sales of Respondents

Bagel Box, Inc.		(no records offered)
Bagel Town, Inc.	110,691	(July 1, 1966 to June 30, 1967)
	87,976	(July 1, 1967 to June 30, 1968)
avg.	98,884	
Benson Bagel Bakery, Inc.	67,998	(1967)
Culver Bagel Bakery, Inc.	147,196	(1967)
Far Rockaway Bagel Bakery, Inc.	143,094	(April 1, 19[illegible] to March 31, 1967)
	51,695	(April 1, 1967 to March 31, 1968)
avg.	97,395	
Flatlands Bagel Bakery, Inc.		(no records offered)
Golden Bagel Corp.	98,682	(Sept. 1, 1966 to August 31, 1967)
Island Park Nassau Bagel Bakery Inc.	202,850	(June 1, 1966 to May 31, 1967)
Laurelton Bagel Bakery		(no records offered)
Neptune - Brighton Bagels, Inc.	49,953	(4 months in 1967 to December 31, 1967)
Nelson Bagel Bakery, Inc.		(no records offered)
Rubinstein Bagels, Inc.	181,401	(Feb. 1, 1967 to Jan. 31, 1968)
Tri-Boro Bagel Co., Inc.	228,642	(Feb. 1, 1967 to Jan. 31, 1968)
D & H Bagel Bakery, Inc.	37,561	(Nov. 1, 1966 to Oct. 31, 1967)
Pop's Bagel Bakery Inc.	104,537	(Jan 1, 1967 to Dec. 31, 1967)

ATTACHMENT 2

JD-597-76

Appendix 47

Limit to Backpay Liability of Each Respondent
1967 Sales X $1/$.07 X 56 = Bagel payroll = Limit of Liability

	1967 Sales	Limit of Backpay Liability		Total Backpay Owed
Bagel Box, Inc.	———	———		$ 3,604
Bagel Town, Inc.	$98,884 (avg.)	$22,225	greater than	11,621
Benson Bagel Bakery, Inc.	67,998	17,346	greater than	4,351
Culver Bagel Bakery, Inc.	147,196	37,550	greater than	6,944
Far Rockaway Bagel Bakery, Inc.	97,395 (avg.)	24,846	greater than	15,004
Flatlands Bagel Bakery, Inc.	———	———		3,041
Golden Bagel Corp.	98,682	25,174	greater than	21,241
Island Park Nassau Bagel Bakery, Inc.	202,850	51,747	greater than	17,143
Laurelton Bagel Bakery	———	———		16,092
Nelson Bagel Bakery, Inc.	———	———		52
Neptune-Brighton Bagels, Inc.	49,953	12,743	greater than	6,068
Rubinstein Bagels, Inc.	181,401	46,276	greater than	7,082
Tri-Boro Bagel Co., Inc.	288,642	73,633	greater than	18,454
D & H Bagel Bakery, Inc.	37,561	9,595	less than	17,135
Pop's Bagel Bakery, Inc.	104,537	26,668	greater than	13,318

ATTACHMENT 3

JD-597-76

Appendix 48

Adjustment of backpay due from Pop's Bagel Bakery, Inc., as successor to D & H Bagel Bakery, Inc., on the D & H Bagel Bakery, Inc., limit of liability.

The liability is 56 percent of the backpay found due, thus each claimants' backpay will be adjusted accordingly:

Murray Boykin	$7,308	to	$4,092
Murray Fertel	33	to	18
Joseph G. Fleischman (deceased)	32	to	18
Eugene Moore	2,365	to	1,324
Seymour Ostrotsky	227	to	127
Samuel Provder	2,460	to	1,378
Gerardo F. Russo	19	to	11
Emanuel Strugatch	1,193	to	668
Markus Weisz	3,430	to	1,921
Jack Sugarman	49	to	27
Israel Weiner	19	to	11
			$9,595

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

BAGEL BAKERS COUNCIL OF GREATER NEW YORK, ET. AL. Petitioners, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	

* * * * * * * * * * * * *

NATIONAL LABOR RELATIONS BOARD, Petitioner, v. FLATLANDS BAGEL BAKERY, INC., LAURELTON BAGEL BAKERY, GOLDEN BAGEL CORP., NEPTUNE BAGEL BAKERS, INC., JOSEPH RUBINSTEIN, MORRIS RUBINSTEIN, AND HERMAN REITER, d/b/a RUBINSTEIN BAGELS, Respondents.	No. 76-4260 76-4282-3

CERTIFICATE OF SERVICE

The undersigned certifies that three (3) copies of the Board's brief in the above-captioned case has this day been served by first class mail upon the following counsel at the addresses listed below:

Laurelton Bagel Bakery
224-17 Merrick Road
Laurelton, New York 11413

Philip Levine, Esq.
16 Court Street
Brooklyn, New York 11241

David Kramer, Esq.
Friedlander, Ganines, Cohen,
Rosenthal and Rosenberg
1140 Avenue of the Americas
New York, New York

Att: Myron W. Siskin, Esq.
855 Avenue of Americas
New York, New York 10001

Harriet Lewis
8101 Flatlands Avenue
Brooklyn, New York 11236

Stanley Bryer, Esq.
Office & P.O. Address
Suite 1800
200 East 42nd St.
New York, N.Y. 10017

Cohn, Glickstein, Lurie & Ostrin
Att: Jerome Lurie, Esq.
1370 Avenue of the Americas
New York, New York

Elliott Moore

Elliott Moore